

YU CHEE LIENG & ORS

KHING TUNG REALTY SDN BHD (NO 2)

HIGH COURT SABAH & SARAWAK, KUCHING

[COMPANIES WINDING-UP PETITION NO: 28-11-2001-II]

31 MARCH 2008

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On 17 January 2008, the High Court ordered that the respondent be wound up based on the inability of the respondent to pay its debts under s. 218(1)(e) of the Companies Act 1965. Mr. Teo Sing Teck, the opposing contributory, appealed against this decision and made this application for a stay of the order pending the disposal of his appeal to the Court of Appeal. The applicant claimed, *inter alia*, that (i) there were merits in his appeal against the winding up order and a miscarriage of justice if the petitioners were allowed to proceed with execution of the order later found to be erroneous; (ii) the applicant would be in no position to carry on with his oppression petition if respondent was wound up; (iii) the winding up petition was closely connected/associated with his oppression petition as the same parties were involved with similar subject matters; (iv) his appeals against the winding-up order and oppression petition would be rendered nugatory; (v) to preserve the *status quo* of the respondent and the lands; and (vi) inability to revive or restore the respondent and recover lands if he succeeds in his appeal.

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Held (allowing the stay application):

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(2) This petition is closely related to two other cases. Also, the petitioners' claims in essence was one of repayment of debts owed by the respondent. If the *status quo* of the respondent with its lands was preserved the petitioners will not be prejudiced. If stay was not granted and if the opposing contributory was successful in his appeal, it would be difficult if not impossible to revert the respondent back to the *status quo*. (para 6)

Case(s) referred to:

Government of Malaysia v. Jasamusa Sdn Bhd [1995] 2 CLJ 701 SC (*refd*)
Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd (No 2) [2003] 5 CLJ 268 HC (*refd*)
Yii Chee Ming v. Teo Ah Khing [2007] 4 CLJ 78 HC (*refd*)

Legislation referred to:

Companies Act 1965, s. 218(1)(e)

For the petitioner - Alvin Chong (Alicia Voon with him); M/s Alvin Chong & Partner Advocates

For the respondent - Lim Heng Choo; M/s Lim & Lim Advocates

For the opposing contributory - Makenda Singh Sandhu (Tay Choon Howe with him); M/s Sandhu & Co Advocates

For the supporting contributory - James Lo; M/s George Lo & Partners Advocates

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

Introduction

[1] On 17 January 2008, I ordered that the respondent be wound up after hearing the application by the petitioners. The ground upon which the petition was based was the inability of the respondent to pay its debts under s. 218(1)(e) of the Companies Act 1965.

[2] Mr. Teo Sing Teck, the opposing contributory, has appealed against my decision and has also made this application for a stay of my order pending the disposal of his appeal to the Court of Appeal.

[3] The petitioners and the supporting contributory, Yii Chee Ming, naturally oppose this stay application while the respondent through its counsel, Mr. Lim Heng Choo, takes a neutral stand and leaves the matter for the court to decide.

A Grounds Of This Application

[4] They are correctly summarized by Mr. Alvin Chong, counsel for the petitioners, in his submission and for convenience I adopt them which are as follows:

- B** a) there are merits in his appeal against the winding up order and a miscarriage of justice if Petitioners were allowed to proceed with execution of the Order later found to be erroneous (para 5 of the Applicant's affidavit);
- C** b) the Applicant would be in no position to carry on with his Oppression Petition if Respondent is wound up (para 6 of the Applicant's affidavit);
- c) the Winding Up Petition is closely connected/associated with his Oppression Petition as the same parties are involved with similar subject matters.
- D** (para 9 of the Applicant's affidavit);
- d) his appeals against the winding-up order and Oppression Petition would be rendered nugatory (para 9.9 of the Applicant's affidavit);
- E** to preserve the *status quo* of the Respondent and the lands (para 10 of the Applicant's affidavit);
- e) inability to revive or restore the Respondent and recover lands if he succeeds in his appeal (para 11 of the Applicant's affidavit);

F The Law

- [5] This area of law is well settled and it is this. Whether to grant a stay is purely a matter of discretion for the court and the applicant must show the existence of "special circumstances" before stay is granted.
- G** What amounts to special circumstances depends on each individual case and the list of factors amounting to special circumstances is "infinite and could grow at any time". (See Edgar Joseph Jr. J in *Government of Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701). It is also my view that a less stringent approach should be taken in this case as it involves the winding up of a company and in this respect I adopt what was said
- H** by the learned judge in *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd* (No 2) [2003] 5 CLJ 268, and it is this:

- I am of the view that there should be a distinction made between an application for a stay of winding-up proceedings and an application for stay of execution of judgment. ... The distinction made between an application for a stay of winding-up proceedings and an application for a stay of execution of judgment, in my view is justified among others
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on the ground that a judgment creditor should not be deprived of the fruits of judgment obtained by him. As such a more stringent test should be applied in application for stay of execution of judgment, namely the “special circumstances” approach. Whereas a winding-up order has grave and wide repercussions on the wound-up company, its creditors, shareholders ... it is my view that a less stringent test is to be adopted in an application to stay a winding-up order, namely to apply “Whether appeal would be rendered nugatory” approach.

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Decision And Reasons Of The Court

[6] Having read the submissions of all the counsels, the affidavits filed and applying the law to the circumstance at hand, I am of the view that stay should be granted and my reasons are these:

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1. This petition is closely related to two other cases, namely, Originating Petition No. 26-03-2000-III-I (Oppression Petition) and *Yii Chee Ming v. Teo Ah Khing @ Teo Cho Teck* [2007] 4 CLJ 78 (Civil Suit No. 22-156-1999-III(I)) in that the dispute from the above two cases and this case stems from the sour relationship between Teo Ah Khing (brother of the opposing contributory) and Yii Chee Ming who is related to the petitioners. As conceded by Mr. James Lo, counsel for the supporting contributory, ideally the appeals of the three cases should be heard speedily and simultaneously by the Court of Appeal and I urge counsels from all sides to make their intention known to the registry of the Court of Appeal.

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2. The petitioners’ claims in essence is one of repayment of debts owed by the respondent, hence I agree with Mr. Sandhu, counsel for the opposing contributory, that if the *status quo* of the respondent with its lands is preserved the petitioners will not be prejudiced. If stay is not granted and if the opposing contributory is successful in his appeal, it would be difficult if not impossible to revert the respondent back to the *status quo*.

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[7] Accordingly I order that the order of winding up of the respondent be stayed until the disposal of the appeal to the Court of Appeal with costs in the cause.

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